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No. 90 -_____

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1990

ALLEN C. KAISER,

Petitioner,

vs.

UNITED STATES POSTAL SERVICE, and the NATIONAL RURAL LETTER CARRIERS' ASSOCIATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI To The United States Court of Appeals For the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the implied remedies doctrine of *Cort v. Ash*[1] entitle career employees of the United States Postal Service to base a cause of action on Section 1006 of the Postal Reorganization Act, Title 39 U.S.C. Section 1006, to challenge a forced reduction in pay rate and pay step upon reassignment within the Postal Service?

2. Does Article 9.1.B. of the collective bargaining agreement between the United States Postal Service and the National Rural Letter Carriers' Association require that PS Schedule career postal employees be paid as newly hired appointees upon reassignment to a vacant position as a rural carrier?

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[1] 422 U.S. 66 (1975).

3. If Article 9.1.B. of the collective bargaining agreement between the United States Postal Service and the National Rural Letter Carriers' Association requires that career postal employees be paid as newly hired appointees upon reassignment into the rural carrier craft is it in conflict with the terms and provisions of the Postal Reorganization Act?

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No. 90 -_____

Supreme Court of the United States

October Term, 1990

ALLEN C. KAISER,[1]

Petitioner,

vs.

UNITED STATES POSTAL SERVICE and the NATIONAL RURAL LETTER CARRIERS' ASSOCIATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For the Sixth Circuit

Petitioner prays that a writ of *certiorari* issue to the United States Court of Appeals for the Sixth Circuit to review the judgment in this case filed on July 10, 1990.

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[1] All parties to this action are identified in the caption.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 908 F.2d 47. It is set forth in the Appendix at A 1 - A 10.

The opinion of the United States District Court for the Eastern District of Michigan has not been officially reported. It is set forth in the Appendix at A 13 - A 24.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 10, 1990. (Appendix at A 11 - A 12). No rehearing or rehearing *en banc* was sought.

The jurisdiction of this Court is invoked pursuant to the provisions of

Title 28 U.S.C. Section 1254(1) to review a civil judgment.

RELEVANT STATUTORY PROVISIONS

39 U.S.C. Section 1006. Right of Transfer

Officers and employees in the postal career service of the Postal Service shall be eligible for promotion or transfer to any other position in the Postal Service or the executive branch of the Government of the United States for which they are qualified. The authority given by this section shall be used to provide a maximum degree of career promotion opportunities for officers and employees and to insure continued improvement of postal services.

Pub.L.91-375, Aug.12, 1970, 84 Stat. 732.

STATEMENT OF THE CASE

In 1987, Petitioner Allen C. Kaiser, a career employee of Respondent Postal Service with ten (10) years service, sought and was granted a reassignment from a city carrier position, where he

was paid on the PS Schedule, to that of a rural carrier. Having been paid according to the PS schedule, upon reassignment he was paid on the RC schedule. Immediately upon reassignment Kaiser became a rural carrier, he was not required to serve the probationary period imposed upon newly hired rural carriers.

At the time of Petitioner's reassignment Section 424.221 of the Postal Service Employee & Labor Relations Manual ["ELM"], which governs salaries upon transfer, provided:

> A postal employee reassigned from a position under the PS schedule to a rural carrier position is placed (a) in the step of the RC schedule which equals the employee's basic salary of (sic) (b) ir the first step for the route which exceeds the employee's former basic salary be (sic) less than one full step, or (c) in the maximum step for the route.

In addition to reliance upon the ELM, prior to his reassignment Kaiser received repeated verbal and written assurances from Postal Service management that he would suffer no diminution in pay or attained step as a result of his re-assignment. In fact, three separate postal officials assured Petitioner that upon transferring his salary would remain unchanged. Each of these representations turned out to be patently false[3]. Commencing with his first rural carrier pay check, and despite his ten years of

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[3] This Court's recent opinion in *Office of Personnel Management v. Richmond*, ____ U.S. ____, 110 S. Ct. 2465, 2471 (1990) does not foreclose equitable estoppel as a viable claim against the government. "[W]e need not embrace a rule that no estoppel will lie against the Government.... We leave for another day whether an estoppel claim could ever succeed against the Government."

seniority, the Postal Service paid Kaiser as an entry level, newly hired rural carrier corresponding to Step B of the RC schedule. This resulted in a 33% pay reduction of approximately $8,000.00 per year. Such a dramatic pay cut worked an extreme hardship on Petitioner, a Vietnam veteran and widower supporting four children.

Although Kaiser sought the immediate assistance of Postal Service management and officials of his union, the National Rural Letter Carriers' Association ["NRLC"], the pay reduction continued unabated.

At first the Postal Service explained Kaiser's pay reduction as occasioned by a "paper work error". However, in responding to Kaiser's

grievance at Step 1 the Postal Service began to justify its actions as being required by Article 9 of the collective bargaining agreement. Article 9, adopted for the first time in the 1984 - 1988 collective bargaining agreement, created two, below entry level pay rates for newly hired rural carriers. Article 9.B.1. provides in pertinent part:

> .... Effective January 19, 1985, all <u>new</u> regular carrier <u>appointees</u> will begin at Step B, except substitute rural carriers who convert to regular status. (Emphasis added).

The Postal Reorganization Act of 1970[1], Title 39 U.S.C. Section 101, *et seq.* ["PRA"] placed labor relations functions of the Postal Service under many of the rules and regulations

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[1] Pub. L. 91-375, Sec. 2, Aug. 12, 1970, 84 Stat. 719.

applicable to the private sector through the National Labor Relations Act ["NLRA"]. However, the PRA continues to govern many Postal Service labor relations matters. Included among the PRA provisions is mandated interest arbitration in the event of an impasse. 39 U.S.C. Section 1207. Thus, when the Postal Service and the NRLC were unable to negotiate a new collective bargaining agreement in 1984, an interest arbitration was held with neutral arbitrator Volz as the head of the panel. The resultant Volz Award established the collective bargaining agreement of 1984, including Article 9 dealing with wages.

Believing that the application of Article 9 to career PS Schedule employees violated existing Postal Service rules

and regulations, contravened express representations and promises made by the Postal Service, and conflicted with Section 1006 of the PRA, Kaiser filed suit on June 16, 1988.[5] Kaiser based his claim on Title 39 U.S.C. Sections 1006 and 1208. Jurisdiction was premised upon Title 28 U.S.C. Sections 1331 and 1339 and Title 39 U.S.C. Sections 409(a) and 1208.[6] Defendants served Answers denying all material allegations and asserting,

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[5] The Complaint was filed in accordance with Rule 23 (b)(2), Federal Rules of Civil Procedure as more than 2,000 PS Schedule employees reassigned as rural carrier have suffered pay and step reductions upon reassignment. Plaintiff's motion for class certification filed on April 24, 1989 was pending at the time of the trial court's dismissal.

[6] Kaiser filed a grievance which, only after the institution of suit, was processed to arbitration. Issues concerning the handling of the grievance by the Union are not a subject of this petition.

inter alia, lack of subject matter jurisdiction. On March 9, 1989 Respondent Postal Service filed a motion to dismiss or in the alternative for summary judgment pursuant to Rules 12 and 56, Federal Rules of Civil Procedure. On March 13, 1989 the NRLC filed a companion motion. Plaintiff's response, with leave of court, was filed on April 13, 1989.

On April 27, 1989 the trial court issued its Memorandum Opinion and Order (Appendix at A 13 - A 24) and Judgment (Appendix at A 25 - A 26), granting Defendants' motions and dismissing the Complaint. On August 1, 1989, after first seeking reconsideration by the trial court, Kaiser filed a timely notice of appeal to the United States Court of Appeals for the Sixth Circuit. Appellate

jurisdiction was based upon Title 28 U.S.C. Section 1291.

The case was argued before the Court of Appeals for the Sixth Circuit on May 7, 1990. The panel, per Judge Kennedy, issued its opinion on July 10, 1990. (Appendix at A 1 - A 10).

The circuit opinion affirmed the trial court's dismissal, holding *inter alia* that "...Congress did not intend section 1006 [of the PRA] to confer an implied right of action on postal employees." Petitioner Kaiser seeks review of this holding.

REASONS FOR GRANTING THE WRIT

The Decision of the Sixth Circuit Determined An Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Court

A. This case presents an important question of first impression under the PRA

Section 1006 of The Postal Reorganization Act, Title 39 U.S.C. Section 1006, provides each postal employee with the right of transfer and mandates that the Postal Service, "...provide a maximum degree of career promotion opportunities for ...employees...." These are general pronouncements, with no specific directives for compliance. And, other than the opinion *sub judice*, there is no statutory or common law guidance which gives life to this section or defines the

parameters of Postal Service obligations.

Petitioner, seeking the protection of Section 1006, challenged the pay reduction he suffered when he transferred within the postal service. He reasoned that while not prohibiting his transfer, the contract provision relied upon to treat him as a newly hired rural carrier for pay purposes, ran afoul of the letter and spirit of Section 1006. By paying Petitioner as a new hire, despite his ten years of seniority, Respondent Postal Service, with the concurrence of Respondent Union, failed to "provide a maximum degree of career promotion opportunities for employees."

The trial and circuit courts, relying on *Gaj v. United States Postal Service*, 800 F.2d 64 (3rd Cir. 1986) and

Blaze v. Payne, 819 F.2d 128 (5th Cir. 1987) held that Section 1006 did not provide a private cause of action. As a result Petitioner was left with no viable challenge to Respondents' unilateral actions. However, neither *Gaj* or *Blaze* expressly consider Section 1006, focusing instead on Sections 1001 and 1002. Thus, other than the opinion in this case there is no appellate guidance as to the meaning of or restrictions imposed by Section 1006.[1]

The reduction in pay and step to Step B of the RC Schedule is not required

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[1] The Federal Circuit in the parallel case of *McGarigle v. United States Postal Service*, 904 F. 2d 687 (Fed. Cir. 1990), expressly declined to address the question of whether or not a private right of action was created by Section 1006.

The issue is awaiting argument before the Ninth Circuit Court of Appeals in *Stupy v. United States Postal Service, et al.*, Case No. 90-15496.

by the Volz award. Under the mandates of 39 U.S.C. Section 1207 the Volz award became the collective bargaining agreement. The Respondents initially interpreted the Volz Award and Article 9 as establishing the new entry level pay steps only for those rural carriers newly hired from the outside after January 15, 1985. Indeed, this is consistent with Section 424.221 of the ELM. However, sometime between January, 1985 and April, 1985, the NRLC and Postal Service reached an informal, unrecorded accord on the interpretation of Article 9.1.B.1. Under this second, unpublished interpretation of the contract the reduced pay and step are applicable to any "new" rural carrier, even those reassigned from the PS Schedule with years of seniority. In

other words, Respondents redefined "new appointee" to mean "reassignment", ignoring the mandates of the ELM.[1] Whether their interpretation is consistent with the PRA is a question which is as yet unanswered. Although the PRA has been in effect for twenty (20) years, no court has addressed the permissible parameters governing the Postal Service and NRLC's interpretation of collective bargaining agreements. The courts, and not the unions with which the postal service bargains, should determine

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[1] In the only case found which addresses this precise issue, Administrative Law Judge Harvey of the Merit System Protection Board determined that a move from a PS Schedule job to an RC Schedule letter carrier position was a reassignment governed by Section 424.221 of the ELM. *Stenuis v. United States Postal Service*, MSPB Boston Regional Office, Docket No. BN0752871011 (Oct. 13, 1987), set forth in the Appendix at A 26 - A 45.

the meaning to be given to Section 1006.

There is no question but that federal statutes take precedence over terms and conditions set forth in collective bargaining agreements. Constitution of the United States, Art. VI, Cl. 2. Thus, if Article 9 of the collective bargaining agreement mandating salary reductions for career postal employees upon reassignment as rural carriers is in conflict with the letter or spirit of Section 1006 the contractual provision must fall. However, the decision of the Court of Appeals deprives Petitioner and the 2,000-plus putative class members of any judicial forum. This court should grant this petition so as to determine the scope, meaning, and purpose of Section 1006 of the PRA.

B. Application of the implied remedies doctrine to Section 1006 of the PRA raises significant issues involving statutory construction and the administration of the PRA

In *Cort v. Ash*, 422 U.S. 66, 78 (1975), this Court established the framework for determining whether a cause of action lies where not expressly conferred by statute. Although subsequent cases have amplified these factors, *Cort* remains the mainstay for the application of the implied remedies doctrine. *E.g.*, *Middlesex County Sewerage Authority v. National Sea Clammers Assoc.*, 453 U.S.1, 13 (1981). Section 1006 of the PRA, the statutory provision at issue, does not provide expressly for a cause of action. Thus, if Section 1006 is entitled to court enforcement, it must be accomplished

through the application of the implied remedies doctrine of *Cort*. The court below ignored the relevant legislative history of the PRA in reaching its decision. The refusal of the court below to allow a private cause of action involves such a plain misinterpretation of Congressional intent as to warrant plenary review and reversal by this Court.

The Court of Appeals' interpretation is inconsistent with other provisions of the PRA and is irreconcilable with the legislative history of the Act. Significantly, neither of the lower courts expressed the view that Congress, as a matter of deliberate choice, prohibited a private cause of action. Indeed, such a choice would clearly have

been in conflict with the purpose of the Act.

Since the passage of the PRA in 1970 the Respondent Postal Service has been obligated to provide maximum promotional opportunities for its employees. Absent guidance from the judiciary the Postal Service has no standards by which to measure compliance with the statute and achievement of its Congressional objectives. Instead, Respondent Union has dictated the manner, method, and terms by which Respondent Postal Service achieves its Congressional mandates. Despite this obvious void in the administration of the PRA, the courts below have refused to exercise jurisdiction.

Expressio unius est exclusio alterius is a well established principle of statutory construction. Thus, where the legislature has expressly provided a particular remedy or remedies, courts should not expand the coverage of the statute. For example, in *National R.R. Passenger Corp. v. National Ass'n. of R.R. Passengers*, 414 U.S. 459 (1974) this Court declined to allow a cause of action for private remedies where the statute conferred a public cause of action. This principle of statutory construction lends compelling support to implying a private cause of action in Section 1006 as there is no public cause of action competing for exclusivity.

C. The determination by the Sixth Circuit affects the rights of thousands of postal employees and involves millions of dollars

The question presented for review is of great fiscal importance and the decision below places more than 2,060 rural carriers in an anomalous and inequitable position. Since the Volz interest arbitration and the adoption of Article 9 of the collective bargaining agreement more than 2,060 career postal workers have been reassigned to rural carrier routes. Each of these employees has ultimately been placed in Step B of the RC Schedule. Although promised pay and rate retention, each of these 2,060 putative class members ultimately suffered pay reductions of thousands of dollars per year. While the application

of Step B to career postal workers reassigned to rural routes may have saved Respondent Postal Service several million dollars in labor costs, it has been at the expense of a group of dedicated, long service employees; employees with a Congressional guarantee of maximum promotional opportunities. The substantial revenue impact of this decision is not limited to those employees who have already been reassigned. All career postal workers who, in the future, are reassigned will be forced to suffer dramatic pay reductions. The decision below places substantial financial burdens on these long time postal workers. We do not believe such financial burdens should be assumed in the absence of a review by

this Court of the ruling below.

A strong Congressional policy reflected in the Postal Reorganization Act is that postal workers reach the maximum pay step for their respective labor grades more expeditiously than was historically true. 116 Cong. Rec. H27602, H27604 (August 6, 1970) (statement of Congressman Derwinski); 116 Cong. Rec. S26955 (August 3, 1970) (statement of Sen. McGee). The application of the Step B of the RC Schedule pay scale to career PS Schedule postal employees has the effect of totally undoing this strongly stated Congressional purpose. Those who cannot afford to suffer a reduction in pay must forebear from seeking a career enhancing job reassignment. Thus, thousands of

postal workers are being subjected to pay reductions which thwart Congressional mandates. There are no similar economic penalties extracted from federal or postal career employees who choose career promotional opportunities. More importantly, thousands more postal workers will continue to suffer the same plight, with no guidance from the judiciary, unless this Honorable Court grants this writ and reviews the decision of the Court of Appeals.

CONCLUSION

For these reasons, a writ of *certiorari* should issue to review the judgment and opinion of the Sixth Circuit and settle the critical questions of statutory construction involved in the

administration and enforcement of the Postal Reorganization Act.

Respectfully submitted,

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RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

No. 89-1897

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ALLEN C. KAISER,
Plaintiff-Appellant,

v.

UNITED STATES POSTAL SERVICE and THE NATIONAL RURAL LETTER CARRIERS ASSOCIATION,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed July 10, 1990

Before: KENNEDY and RYAN, Circuit Judges; and EDWARDS, Senior Circuit Judge.

KENNEDY, Circuit Judge. Appellant, a postal worker, was treated as a new hire when he sought reassignment from an urban letter-carrier route to a rural route. He claims his wages were wrongfully reduced when he was transferred to the rural route. Appellant sued his union, the National Rural Letter Carriers Association (NRLCA), under 39 U.S.C. § 1208(b), alleging that it breached its duty of fair representation. He also sued the United States Postal Service, claiming that he had an implied right of action under 39 U.S.C. § 1006, which establishes career postal employees' right of transfer.

The District Court, in granting summary judgment for appellees, rejected his section 1208(b) claim on the basis that appellant failed to exhaust his remedies under the collective bargaining agreement and his section 1006 claim after holding that Congress did not intend section 1006 to confer an implied right of action on postal employees. Finding no error in the District Court's judgment, we AFFIRM.

In 1987, appellant took and passed an examination in order to become a rural letter carrier for the United States Postal Service (USPS). He was offered and accepted a position as a rural carrier upon representations by a Postmaster Heffington that he would not experience a cut in pay. Prior to his reassignment he also received a form from the Postal Service stating that his pay would not be reduced. However, his first paycheck as a rural carrier was substantially below his previous salary as an urban carrier. When he informed his supervisor of this, appellant was told it was the result of a clerical error and would be taken care of. He learned one month later that his salary had in fact been reduced from $27,401 as a city carrier to $19,541 as a rural carrier.

Appellant filed a Step 1 grievance. At a hearing he learned that he had been placed on the rural carrier's pay schedule as a new employee, notwithstanding ten years of prior service. Following the denial of his Step 1 grievance, he filed a Step 2 grievance. His area steward, Robert Knight, told him that Article 9.1(B) of the NRLCA contract put him at the Step B pay level and considered him a new hire.[1] Appellant alleges that Knight told him the NRLCA was tired of city carriers taking rural carrier jobs and that Knight consequently was reluctant to pursue his grievance vigorously. Knight did say,

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[1]The apparent purpose of Article 9.1(B) of the labor agreement is to guarantee job promotion of rural letter carriers by treating urban carriers who transfer as new hires. However, appellant contends that the rural route for which he was hired was vacant, so he was not displacing any rural carrier.

however, that if appellant was promised his former pay level upon reassignment, the NRLCA would pursue a grievance. On November 28, 1987, Knight told appellant that Zipporia Sloan, a Detroit labor relations official, had extended the time limit for presenting a Step 2 grievance.

On December 7th, Sloan returned appellant's Step 2 grievance for resubmission or further Step 1 discussions. Appellant then contacted the NRLCA labor relations director, Steven Smith, who told appellant on December 13th that pending contract negotiations would hopefully put him at his previous pay rate. Appellant telephoned Knight on December 21st and asked about the status of his grievance. He phoned again on January 6, 1988, at which time Knight told him he needed some original documents to process the Step 2 appeal. Appellant submitted copies and was informed on January 12th by Knight that he would not appeal the grievance without original documents.

On February 7th, appellant wrote to Smith and renewed his request for a Step 2 hearing. Receiving no response, appellant filed the present action in federal court. On November 14, 1988, the NRLCA appealed the grievance to Step 2. Appellant unsuccessfully appealed his grievance up through Step 4. His case proceeded to arbitration, which was scheduled for May 5, 1989. The District Court granted summary judgment for appellee on April 27, 1989, holding that appellant failed to exhaust his remedies called for in the collective bargaining agreement. Appellant made a motion to alter or amend that judgment when the May 5th hearing did not occur because of a scheduling conflict. That motion was denied on the ground that arbitration had been rescheduled for June 7, 1989[2].

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[2]That hearing was apparently held, and a final arbitration Opinion and Award was issued on November 15, 1989, denying appellant's grievance.

A. Appellant's Section 1208(b) Claim

Appellant claims that the union's failure to process his grievance in a timely manner constituted a breach of the duty of fair representation and breach of contract. It is well-settled that a plaintiff must exhaust contract remedies before seeking review in federal court. To recover from an employer for a violation of a collective bargaining agreement, an employee must first show that his union breached its duty of fair representation in handling his grievance. *Bowen v. United States Postal Service,* 459 U.S. 212 (1983). To establish that the union breached its duty of fair representation, the employee "must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress." *Republic Steel Corp. v. Maddox,* 379 U.S. 650, 652 (1965) (emphasis in original). This Court has stated that "[i]t is axiomatic that an aggrieved employee must exhaust any exclusive grievance and arbitration procedure created in a collective bargaining agreement prior to bringing a . . . suit against the employer." *Poole v. Budd Co.,* 706 F.2d 181, 183 (6th Cir. 1983).

Appellant brought his section 1208(b) suit before exhaustion of the arbitration and grievance procedures set out in the collective bargaining agreement. He claims, however, that he fits within the exceptions to total exhaustion carved out in *Clayton v. International Union, U.A.W.,* 451 U.S. 679 (1981). Exhaustion is not required where: 1) the union officials appear so hostile that a fair hearing is not possible; 2) the grievance and arbitration procedure is inadequate to address the problem or award full relief; or 3) exhaustion would delay the ability to get a judicial hearing on the claim. *See Vaca v. Sipes,* 386 U.S. 171, 185 (1967) (exhaustion to be disregarded only if employer's conduct repudiates contractual remedies, use of grievance procedure would be futile, or union breaches duty by wrongfully refusing to process grievance). The District Court expressly found "no serious suggestion of any basis for finding that exhaustion of plain-

tiff's internal appeal rights will be futile" and held that exhaustion before filing his federal action was not excused. Appellant points to delay and animosity on the part of Knight and Smith in processing his grievance. However, most, if not all, of the delay was caused by appellant's unwillingness to comply with the union's demand that it be furnished with original documents. Moreover, the fact that appellant's grievance was processed and arbitration was held belies his assertion that the union wrongfully refused to process his grievance once given the required documents. We agree with the District Court that appellant was required to and failed to exhaust his administrative remedies.

B. Appellant's Implied Right of Action Under Section 1006

Appellant claims the District Court erred in holding he has no implied right of action under section 1006. That section provides that:

> Officers and employees in the postal career service of the Postal Service shall be eligible for promotion or transfer to any other position in the Postal Service or the executive branch of the Government of the United States for which they are qualified. The authority given by this section shall be used to provide a maximum degree of career promotion opportunities for officers and employees and to insure continued improvement of postal services.

39 U.S.C. § 1006. In determining whether a federal statute confers an implied right of action, we are required to consider whether: 1) the plaintiff is of the class for whose *especial* benefit the statute was created; 2) whether there is any legislative intent, explicit or implicit, which either creates or denies a private remedy; 3) whether finding an implied cause of action is consistent with the underlying purposes of the legislative scheme; and 4) whether the cause of action is one that is tradi-

tionally left to state law such that it would be inappropriate to infer a cause of action based only on federal law. *Cort v. Ash,* 422 U.S. 66, 78 (1975).

Appellant clearly meets the first *Cort* criteria. Section 1006 was enacted to guarantee the right of employees in the postal service to be eligible for transfers and promotions, and appellant is unquestionably a postal employee. In deciding if the second factor—legislative intent to create a private remedy—is met,

> [w]e look first, of course, to the statutory language, particularly to the provisions made therein for enforcement and relief. Then we review the legislative history and other traditional aids of statutory interpretation to determine congressional intent.

Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13 (1981). The language of section 1006 does not evidence an intent to create a private cause of action. Section 1006 provides that career postal employees shall be *eligible* for transfer and promotion if they are otherwise qualified, but it does not *entitle* them to transfer and promotion.[3] Although the stated purpose of the section is to "provide a maximum degree of career promotion opportunities for officers and employees," we fail to see how merely making employees eligible for transfer and promotion implies a congressional intent to vest employees with a legal cause of action whenever a transfer or promotion is denied. The congressional goal of maximizing career opportunities in the postal service can be accomplished by making employees *eligible* for transfer and promotion without giving them a cause of action to assert if they are denied transfer or promotion.

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[3]Appellant argues that because 39 U.S.C. § 1006 is labeled "Right *to* Transfer," he is given entitlement to transfer and promotion. However, § 1006 is in fact entitled "Right *of* Transfer." This title seems consistent with our holding that § 1006 merely extends eligibility of transfer and promotion, rather than entitlement to transfer and promotion.

The distinction we draw between "eligibility" and "entitlement" is borne out by United States Supreme Court opinions discussing private causes of action. Statutory language that "explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff in the case" indicates a congressional intent to create a private right of action. *See Universities Research Ass'n v. Coutu,* 450 U.S. 754, 770 (1981), *citing Cannon v. University of Chicago,* 441 U.S. 677, 690 n.13 (1979). However, if the statute merely imposes a duty without "an unmistakable focus on the benefited class," *Cannon,* 441 U.S. at 691, there is "far less reason" to infer a private cause of action. *Id.* at 690-91. Section 1006 is a statute of the latter kind. Rather than providing an unmistakable right to postal employees by entitling them to transfer and promotion, it merely makes them eligible for promotion and transfer. Section 1006's language does not show an intent to create a private right of action.

Failing to find intent to create a private cause of action in the language of section 1006, we must examine the statute's legislative history for evidence of such intent. In holding that section 1006 does not provide a private right of action, the District Court relied on *Blaze v. Payne,* 819 F.2d 128 (5th Cir. 1987) and *Gaj v. United States Postal Service,* 800 F.2d 64 (3d Cir. 1986). Both *Blaze* and *Gaj* found that section 1001(b)'s legislative history was devoid of an intent to create a private cause of action. Appellant argues that these cases are not determinative of whether a private right of action exists under section 1006, since section 1001 "merely directs the Postal Service to establish personnel management procedures." *Blaze,* 819 F.2d at 129-30. According to appellant, however, section 1006 grants a specific substantive right to postal employees for transfer and promotion in a way that section 1001 does not.

In discussing the general purposes of the Postal Reorganization Act, 39 U.S.C. § 101 *et seq.,* the Third Circuit Court of Appeals in *Gaj* stated:

> The clear intent of Congress in passing the Postal Reorganization Act was to make the Postal Service an independent executive agency, to improve the efficiency of the mail system, to improve labor management relations, and to make the Postal Service self-supporting. 39 U.S.C § 101. Neither the language of the statute nor its legislative history shows that Congress intended to create a private remedy.

800 F.2d at 68. Admittedly, these statements were made in the context of determining whether section 1001(b) provided a private right of action. However, the Fifth Circuit Court of Appeals in *Blaze* conducted a broader review of the legislative scheme created by the Postal Reorganization Act which applies equally to section 1006. It held that because of the labor law scheme embodied in the entire Act, Congress did not intend to provide a private cause of action:

> Reinforcing our conclusion that Congress did not intend to authorize an additional employee remedy in § 1001(b) is the otherwise comprehensive labor law scheme that was embodied in the Postal Reorganization Act, 39 U.S.C. § 101 et seq. and was modeled after private sector labor law. 39 U.S.C. §§ 1201-09. . . . Pursuant to this scheme, postal employees were given full right to bargain collectively over their wages, hours, and conditions of employment through exclusive bargaining representatives. 39 U.S.C. § 1202-06. The Postal Service is the only federal entity covered by the National Labor Relations Act and subject to the jurisdiction of the National Labor Relations Board. Postal employees, like private employees, may file unfair labor practice charges with the NLRB . . . or pursue employment discrimination claims. . . . Congress expressly deviated from the private sector model in granting postal preference eligibles, principally veterans, the option to challenge adverse actions before

> the Merit Systems Protection Board. 39 U.S.C. § 1005. In the face of this carefully crafted body of labor law pronouncements, the Third Circuit's description of Congressional intent [in *Gaj*] is, if anything, an understatement. There is no room for the weedlike implied remedy sought by Blaze in the flourishing garden of express employee remedies created pursuant to the Postal Reorganization Act.

Blaze, 819 F.2d at 130 (citations omitted; footnote omitted). The existence of a myriad of employment remedies compels the finding that Congress did not intend private enforcement of employment rights under the Postal Reorganization Act.

Appellant also argues that 28 U.S.C. § 1339 gives district courts original jurisdiction to hear civil cases arising under "any Act of Congress relating to the postal service." From this he contends that private causes of action exist side-by-side with the remedies provided in the Postal Reorganization Act, since it would be inconsistent for Congress to eliminate private causes of action without modifying section 1339. This reasoning is flawed in several respects. First, the presence of congressionally-conferred federal jurisdiction does not evidence an intent to provide a right to be heard in federal court. *See National Ass'n of Postal Supervisors v. United States Postal Serv.*, 602 F.2d 420, 429 (D.C. Cir. 1979) ("[t]he existence of a jurisdiction-conferring statute does not alone create a right of action for judicial review . . ."). Second, the broad grant of jurisdiction for suits arising from "any Act of Congress relating to the postal service" does not imply that Congress intended there to be a private right of action with regard to section 1006. Saying that federal courts have jurisdiction to hear civil actions arising under any act relating to the postal service in no way means that all acts relating to the postal service give rise to a civil right of action.

Having determined that neither the language, structure, nor the legislative history of the statute shows a congressional

intent to fashion an implied private remedy, we need not consider the remaining two factors outlined in *Cort*. *See California v. Sierra Club*, 451 U.S. 287, 298 (1981) (last two *Cort* "factors are only of relevance if the first two factors give indication of congressional intent to create the remedy").

C. Conflict Between the Labor Contract and 39 U.S.C. § 1006

Appellant lastly argues that under the Supremacy Clause of the United States Constitution, the Postal Reorganization Act preempts any contractual agreement and that therefore the Postal Service cannot rely on contract provision to deprive appellant of rights guaranteed by the Postal Reorganization Act. He says that the contract requirement that all new rural carriers begin at Step B pay level violates his right to transfer under section 1006. We disagree. First, it is clear that his "right" to transfer was not impeded, since he is currently a rural carrier. Second, as discussed above, section 1006 does not confer an absolute right to transfer, but rather makes postal employees eligible for transfer and promotion. Third, even assuming that section 1006 does confer such a right, there is nothing in the statute that requires employees to be transferred at their previous rate of pay. There is no conflict between 39 U.S.C. § 1006 and the pay structure as set out in the bargaining agreement.

Because appellant failed to exhaust available remedies as provided in the collective bargaining agreement, his claim under 39 U.S.C. § 1208(b) was properly dismissed. His claim under section 1006 was also properly dismissed because there is no indication that Congress intended the private cause of action asserted by appellant. Accordingly, the judgment of the District Court is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NO. 89-1897

ALLEN C. KAISER,

Plaintiff-Appellant,

v.

UNITED STATES POSTAL SERVICE;
THE NATIONAL RURAL LETTER
CARRIERS ASSOCIATION,

Defendants-Appellees.

Before: KENNEDY and RYAN, Circuit Judges; and EDWARDS, Senior Circuit Judge

J U D G M E N T

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district

court in this case be and the same is hereby affirmed.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

A TRUE COPY
Attest:
LEONARD GREEN, Clerk
By /s/ Patricia J. Elder
Deputy Clerk

Issued as Mandate: AUGUST 15, 1990
Costs: NONE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ALLEN C. KAISER et al.,

Plaintiffs,

v.

UNITED STATES POSTAL SERVICE and NATIONAL RURAL LETTER CARRIERS' ASSOCIATION,

Defendants.
_____/

CIVIL ACTION
NO. 88-2498

Hon. Richard F. Suhrheinrich

MEMORANDUM OPINION AND ORDER

This matter is before the Court on a motion to dismiss, or in the alternative for summary judgment, filed by defendant United States Postal Service ("USPS") and a motion for summary judgment filed by defendant National Rural Letter Carriers' Association ("NRLCA"). Plaintiff has responded and pursuant to Local Rule 17(1)(2), the Court finds this matter

ripe for decision without oral argument.

In the instant action plaintiff,[1] a former non-rural carrier employee of the USPS, challenges his reduced wage assignment resulting from a requested transfer from city carrier to rural carrier. Plaintiff contends the circumstances surrounding his transfer violates the Postal Reorganization Act (PRA), 39 U.S.C. Sections 1006, 1208(b). Plaintiff's claim under Section 1208(b) asserts a breach of duty of fair representation by the NRLCA and a breach of contract claim against the USPS. Plaintiff further claims defendant USPS failed to comply with the statutory

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[1] Plaintiff has also filed a motion to certify this matter as a class action. Because of the resolution of defendants' motions, the Court shall not address plaintiff's class certification request.

requirement of Section 1006.

I. Claims Under Section 1208

Defendants bring the instant motions for summary judgment, contending any cause of action under Section 1208(b) is not ripe. Under Fed. R. Civ. P. 56(c), summary judgment may be granted when there is no genuine issue as to any material fact and when the moving party is entitled to judgment as a matter of law. Stephens v. Norfolk and Western Railroad Co., 792 F.2d 576, 579 (6th Cir. 1986); Atlas Concrete Pipe, Inc. v. Roger J. Au & Sons, Inc., 668 F.2d 905, 908 (6th Cir. 1982). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; summary judgment may properly

be granted when there is merely a colorable dispute as to a material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). There is no express or implied requirement that the moving party support its motion with affidavits or similar materials negating the opponent's claim; the movant need only point out the absence of evidence supporting the nonmovant's claim. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). After such a showing is made, the nonmoving party must go beyond the pleadings to designate, by affidavit, deposition, interrogatory, or otherwise, "specific facts showing that there is a genuine issue for trial." Id. at 324. However, when determining a motion for summary judgment, the Court must view the evidence in the light most favorable to

the nonmoving party. Watkins v. Northwestern Ohio Tractor Pullers Association, 630 F.2d 1155, 1158 (6th Cir. 1980). Evidence, together with all reasonable inferences to be drawn therefrom, must be construed in the nonmoving party's favor. Adickes v. Kress & Co., 398 U.S. 144, 159 (1970).

Plaintiff's count under Section 1208(b) alleges a breach of the duty of fair representation and a breach of contract claim. However, it is clear that plaintiff has failed to exhaust his contract procedures as this issue is set for arbitration on May 5, 1989. Exhaustion of contractually-agreed upon remedies under the grievance/arbitration provisions of the collective bargaining agreement (CBA) between defendants NRLCA and USPS is a jurisdictional prerequisite

to suit in this Court. Vaca v. Sipes, 386 U.S. 171, 184-85 (1967); Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53 (1965); Wimberly v. Clark Controller Co., 364 F.2d 225, 228 (6th Cir. 1966). A plaintiff will be excused from exhaustion "where an aggrieved employee cannot obtain either the substantive relief he seeks or reactivation of his grievance...." Clayton v. UAW, 451 U.S. 679, 693 (1981). In the instant case, there is no serious suggestion of any basis for finding that exhaustion of plaintiff's internal appeal rights will be futile. Accordingly, the Court finds plaintiff's failure to exhaust his contractual grievance procedures prior to institution of this suit necessitates issuance of judgment in favor of defendants as to plaintiff's Section

1208(b) claim.

II. Claims Under Section 1006

As to plaintiff's claim under Section 1006, defendant USPS contends no private cause of action exists under this section. Section 1006 provides:

> Officers and employees in the postal career services of the Postal Service shall be eligible for promotion or transfer to any other position in the Postal Service or the executive branch of the Government of the United States for which they are qualified. The authority given by this section shall be used to provide a maximum degree of career promotion opportunities for officers and employees and to insure continued improvement of postal services.

Essentially, plaintiff contends that the circumstances surrounding USPS' transfer of plaintiff violates Section 1006; plaintiff contends his requested transfer from city carrier to rural

carrier resulted in a wage reduction in contravention of section 1006, making USPS employees "eligible for promotion or transfer." In its motion for summary judgment, USPS contends that no private right of action exists under section 1006. Although no cases have dealt expressly with section 1006, several courts have addressed suits asserting a private right of action under other sections within the PRA.

Most recently, the Fifth Circuit found no private cause of action exists to remedy unpleasant working conditions based on section 1001(b) authorizing the USPS to establish procedures governing employee career development and adverse employment actions. Blaze v. Payne, 819 F.2d 128, 129-30 (5th Cir. 1987). As the Blaze court noted, "[w]e are authorized

to imply private rights of action only if Congress can be fairly said to have intended them. To determine Congressional intent, '[w]e look first, of course, to the statutory language, particularly to the provisions made therein for enforcement and relief.'" Id. at 129 (quoting Middlesex County Sewerage Auth. v. National Sea Clammers, 453 U.S. 1, 13 (1981)).

In Gaj v. United States Postal Service, 800 F.2d 64, 68 (3d Cir. 1986), the court discussed the Congressional intent behind the PRA.

> The clear intent of Congress in passing the Postal Reorganization Act was to make the Postal Service an independent executive agency, to improve the efficiency of the mail system, to improve labor management relations, and to make the Postal Service self-supporting. 39 U.S.C. Section 101. Neither the language of the statute nor its

> legislative history shows that Congress intended to create a private remedy.

In applying this clear legislative intent, the Blaze court noted:

> Reinforcing our conclusion that Congress did not intend to authorize an additional employee remedy in Section 1001(b) is the otherwise comprehensive labor law scheme that was embodied in the Postal Reorganization Act, 39 U.S.C. Section 101 et seq. and was modeled after private sector labor law.... In the face of this carefully crafted body of labor law pronouncements, the Third Circuit's description of Congressional intent is, if anything, an understatement. There is no room for the weedlike implied remedy sought by Blaze in the flourishing garden of express employee remedies created pursuant to the Postal Reorganization Act.

Blaze, 819 F.2d at 130.

Plaintiff attempts to distinguish these cases, contending that Section 1006, unlike Section 1001, provides

employees with a specific substantive right. The Court disagrees. Section 1001 provides for the establishment of personnel management procedures; Section 1006 merely authorizes transfer to other USPS positions or to a position within the executive branch. As in Section 1001, Section 1006 contains no provision for enforcement or relief. Certainly, Section 1006 does not require that a transfer request must be granted, nor does this section necessitate that every transfer be made without a reduction in the transferee's wages. Plaintiff's position could result in absurd results, allowing the Secretary of Defense to transfer to the USPS maintenance position while maintaining the salary of the Secretary of Defense.

The Court finds no legal basis by

which to distinguish Blaze and Gai. In the absence of any evidence demonstrating Congress intended to grant a unique private cause of action to USPS employees, this Court may not infer such a right. Accordingly, plaintiff has failed to state a claim under Section 1006.

For the foregoing reasons,

IT IS HEREBY ORDERED that defendant National Rural Letter Carriers' Association's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that defendant United States Postal Service's motion to dismiss, or in the alternative, summary judgment, is GRANTED.

/s/ Richard F. Suhrheinrich
United States District Judge

Dated: April 27, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ALLEN C. KAISER et al.,

Plaintiffs,

v.

UNITED STATES POSTAL SERVICE and NATIONAL RURAL LETTER CARRIERS' ASSOCIATION,

Defendants.

CIVIL ACTION
NO. 88-2498

Hon. Richard F. Suhrheinrich

JUDGMENT

In accordance with the Memorandum Opinion and Order entered this date,

IT IS ORDERED AND ADJUDGED that summary judgment be, and hereby is, GRANTED in favor of defendants.

Dated at Detroit, Michigan, this 27th day of April, 1989.

David R. Sherwood
Clerk of the Court
/s/ Deputy Clerk

A 26

APPROVED:

/s/ Richard F. Suhrheinrich
United States District Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
BOSTON REGIONAL OFFICE

MICHAEL J. STENUIS, Appellant,	)	DOCKET NUMBER BN07528710177
v.	)	
UNITED STATES POSTAL SERVICE, Agency.	)	DATE: October 13, 1987

Michael J. Stenuis, Ashburnham, Massachusetts, pro se.

Donald J. Lavallee, Worcester, Massachusetts, for the agency.

BEFORE

Rosemary E. Harvey
Administrative Judge

INITIAL DECISION

Appellant filed an appeal alleging that the agency improperly reduced his pay. For the reasons below, the agency's

action in reducing appellant's pay is REVERSED.

ANALYSIS AND FINDINGS

Record evidence shows that appellant was appointed to a position as a Distribution Clerk in October 1984. In December 1985 appellant accepted a reassignment to a position as a Rural Carrier. Prior to accepting the reassignment, appellant was assured by the agency that if he accepted the reassignment to the Rural Carrier position he would suffer no loss of pay. However, in April 1986 the agency reduced appellant's pay by approximately six thousand dollars per year. The agency informed appellant that this reduction in pay was necessary because of a provision in the collective bargaining agreement between the National Rural Letter

Carriers' Association and the agency. According to Article 9.1.B.1. of that agreement, all new Rural Carrier appointees would start at the new Step B salary level. This new Step B level was approximately six thousand dollars less than appellant had been earning as a Distribution Clerk.

With his appeal, appellant submitted a copy of Section 424.221 of the Employee & Labor Relations Manual (E&LRM) which states that a postal employee who is reassigned from a position under the PS schedule to a Rural Carrier position is entitled to maintain the rate of pay he had in his PS position. Appellant argued that ARticle 9.1.B.1. did not apply to him because, although he was a new Rural Carrier, he was not a new appointee to the Postal Service.

In an order issued on July 14, 1987, I informed the parties that, based upon my review of Section 425.221 of the E&LRM, it appeared to me that appellant was entitled to retain his basic rate of pay as a Distribution Clerk. If appellant were entitled to retain his basic rate of pay, then the agency's action in reducing his pay would be an adverse action. If the action were taken without giving appellant the required procedural protections of 5 U.S.C. Section 7513, the action would be reversible because of harmful procedural error. *See Hall v. U.S. Postal Service,* 26 M.S.P.R. 233 (1985).

On the other hand, I noted that 5 C.F.R. Section 752.401(c)(11) might apply to this case. Under 5 C.F.R. Section 752.401(c)(11), reduction of an

employee's rate of pay from a rate which is contrary to law or regulation to a rate which is required or permitted by law or regulation, is excluded from those adverse actions appealable to the Board. If this regulation applied to this case, the Board would lack jurisdiction because the reduction of appellant's pay would not be considered an adverse action. I provided both parties with an opportunity to respond to this order.

In its response, the agency asserted that 5 C.F.R. Section 752.401(b)(11) applied to this case and, thus, the Board lacked appellate jurisdiction. The agency argued that in April 1986 when it established appellant's rate of pay at the new Step B in the Rural Carrier position, it followed the provisions of the collective bargaining agreement

between it and the Rural Letter Carriers' Association. The agency noted that Article 9.1.B.1 of the collective bargaining agreement states that "Effective January 19, 1985, all new regular carrier appointees will begin at Step B, except for substitute rural carriers who convert to regular status." (emphasis supplied). The agency alleged that it was the mutual understanding between it and the Rural Letter Carriers' Association that Article 9.1.B.1 applied to all new Rural Carrier appointees whether they came to the position from outside or inside the Postal Service.

The agency also noted that the collective bargaining agreement in Article 9.2.A.1.u. states the following: "In the event the provisions of this section conflict with any Postal Service

regulation, manual, or handbook, the provisions of this section will be deemed controlling." *See* Appeal File, Tab 3-1B. The agency argued that this statement referred to Article 9.1.B.1. and thus superceded the E&LRM section cited by appellant.

Finally, in a conference call I had with the parties on September 14, 1987, the agency representative argued that because Article 9.1.B.1. contained only one exception, i.e., substitute Rural Carriers who convert to regular status are not subject to the new Step B salary level, it must necessarily follow that all other persons who become Rural Carriers are included in it.

In his response, appellant reiterated his position that Article 9.1.B.1 is not applicable to him because

he was not a new appointee to the agency. Appellant argued that he was reassigned to the Rural Carrier position as a lateral transfer and that, under Section 424.221 of the E&LRM, he was entitled to salary protection. Appellant further argued that the agency should be estopped from following the provision of the collective bargaining agreement because it had assured him that he would suffer no loss of pay if he transferred to the Rural Carrier position. He argued that the agency should be held accountable for its failure to advise him correctly and for its failure to be aware of the governing regulation.

After consideration of all of the above, I find that 5 C.F.R. Section 752.401(c)(11) does not apply to this case because appellant's reduction in pay

was not from a rate contrary to law or regulation to a rate which is required by law or regulation. I do not find that Article 9.2.A.1.u. of the collective bargaining agreement refers to Article 9.1.B.1. of the agreement as contended by the agency. Article 9 contains two sections entitled as follows: "Section 1. Salaries and Wages" and "Section 2. Compensation, Allowance, and Fees." Paragraph u. appears under Section 2.A.1. I find that paragraph u. refers only to Section 2 of Article 9 and not to Section 1 of Article 9. Section 1 of Article 9 does not contain language stating that its provisions are controlling if any of them conflict with another Postal Service regulation or manual. Furthermore, the agency submitted no evidence to support its allegation that it is the mutual

understanding between it and the Rural Letter Carriers' Association that Article 9.1.B.1. applies to everyone who comes to the Rural Carrier position whether from inside or outside the agency. Thus, I find no merit to the agency's argument that Article 9.1.B.1. supercedes Section 424.221 of the E&LRM.

Furthermore, I find merit to appellant's argument that he is not a "Rural Carrier appointee" under the provisions of Article 9.1.B.1. Appellant's PS-50 indicates that he was reassigned to the Rural Carrier position. *See* Appeal File, Tabs 1 and 3-2. It does not state that he was appointed to it.

In addition, in the two pages of the E&LRM which appellant submitted with his appeal, there is a distinction made between a "...present postal employee who

receives an appointment as a regular rural carrier..." and a "...postal employee who is reassigned from a position under the PS schedule to a rural carrier position..." *See* Section 424.211(c) and Section 424.221 respectively (emphasis supplied). According to these sections, the employee who receives an appointment can be placed in any step for the route up to the step which is less than one full step above his highest previous basic salary whereas the employee who is reassigned is placed in the step of the Rural Carrier schedule which equals his basic salary. Thus, the appointee may receive a salary that is less than his present salary whereas the reassignee will not receive anything less than his current salary. This distinction, I find, lends support to

appellant's argument that as a reassignee to the Rural Carrier position he does not fall within the provision of Article 9.1.B.1. which covers appointees and sets their salary at the new Step B.

The agency's argument that appellant is included in Article 9.1.B.1. because he does not fall within its one exclusion might have some merit were it not for the distinction made between "appointees" and "reassignees" in the E&LRM. Furthermore, salary protection to Substitute Rural Carriers who convert to Regular Carrier positions was granted in Section 424.21 of the E&LRM, entitled "Appointment." Thus, in the E&LRM, Substitute Rural Carriers who convert to Regular Carrier positions are considered to be appointees. If they are considered appointees, they would be covered by

Article 9.1.B.1. unless excluded. Thus, it makes sense that they are the only group specifically identified as being excluded from the new lower Step B salary level.

Based upon all of the above, I find no merit to the agency's argument that appellant, as a reassignee, is covered by Article 9.1.B.1 simply because he does not fall within the one specific exclusion contained in it.

Although the agency did not allege that Article 19, Section 1 of the collective bargaining agreement had any bearing on this case, I find it appropriate to mention it here. That section states the following: "Those parts of all handbooks, manuals, and published regulations of the Postal Service, that directly relate to wages,

hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect...." Based upon the distinction between an appointee and a reassignee and the fact that Article 9.1.B.1. refers only to appointees, I find that Section 424.211 of the E&LRM does not conflict with the collective bargaining agreement. Thus, I do not find that Article 19, Section 1 applies to this case.

On the basis of all of the above, I find that appellant is not affected by the provision of Article 9.1.B.1 that established a new Step B for the Rural Carrier position. I find that appellant is entitled to the salary protection granted him in Section 424.221 of the

E&LRM. Thus, I further find that the agency has not shown that it reduced appellant's rate of pay from a rate which was contrary to law or regulation to a rate which was required or permitted by law or regulation as provided in 5 C.F.R. Section 752.401(c)(11). Furthermore, the agency's action in reducing appellant's pay was an adverse action. There is no dispute that the agency effected the reduction in pay without using the adverse action procedures outlined in 5 U.S.C. Section 7513. Thus, the action is reversible because of harmful procedural error. *See id.*

In my July 14, 1987 order to the parties, I informed them that I was prepared to find that a waiver of the timeliness requirement in filing an appeal with the Board was warranted. I

noted that appellant filed his appeal almost 14 months late. However, there was no indication in appellant's appeal that the agency ever told him that he could file an appeal with the Board.

I provided the agency with an opportunity to present evidence and/or argument to show cause why I should not waive the timeliness requirement. The agency did not submit any evidence and/or argument on the timeliness issue.

Appellant indicated in his petition for appeal that he had been protesting his reduction in pay since it occurred and had been pursuing avenues which he thought would help him in overturning the action. Appellant stated that he contacted his union representative and various personnel in the Postal Service immediately after his pay was reduced.

The only answer he ever received was that Article 9.1.B.1 of the collective bargaining agreement was controlling in his case and that he had no recourse. Appellant enclosed a copy of a letter he wrote to Senator Edward Kennedy on April 28, 1986 seeking his assistance. Appellant also stated that he contacted the agency's Equal Employment Opportunity Counselor in May 1986 to see if he could offer any assistance. It was months before he got an answer that nothing could be done. Appellant did not state how he found out about the Board and that there was a possibility of filing an appeal with the Board.

After consideration of all of the above, I find that appellant exercised due diligence in pursuing his complaint and seeking redress for what he believed

was an injustice done to him. The agency has presented no argument that it will suffer substantial prejudice by waiving the timeliness requirement. The outcome of this case was determined by the written provisions of the E&LRM and the collective bargaining agreement and did not depend upon people's memories or recollections of events. Thus, the passage of time between the reduction in pay and the filing of the appeal did not affect the case. Therefore, I find that good cause has been shown to waive the timeliness requirement for filing an appeal with the Board. *See Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180 (1980).

DECISION

The agency's action is REVERSED.

ORDER

The agency is ORDERED to cancel the reduction in pay and to retroactively restore appellant to his basic rate of pay as a Distribution Clerk effective December 7, 1985. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

The agency is also ORDERED to issue a check to appellant for the appropriate amount of back pay and benefits, as required by Postal Service regulations, no later than 60 calendar days after the date this initial decision becomes final. Appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to

help it comply.

If there is a dispute about the amount of back pay due, the agency is ORDERED to issue a check to appellant for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

The agency is further ORDERED to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant should ask the agency about its efforts to comply.

FOR THE BOARD: /s/ Rosemary E. Harvey
Administrative Judge